Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

NO. ~~79-1~~ 199

THE STATE OF TEXAS,
Petitioner

v.

ANN BATTARBEE,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE 183rd DISTRICT COURT OF HARRIS COUNTY, TEXAS

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SUBJECT INDEX

	Page
OPINIONS AND ORDER BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	4
CONSTITUTIONAL PROVISIONS INVOLVED	5
STATUTORY PROVISIONS INVOLVED	5
STATEMENT OF THE CASE	6
REASONS FOR GRANTING THE WRIT	
THRESHOLD QUESTION	9
THE INSTANT QUESTION	10
CONCLUSION	17
APPENDIX A: ORDER OF 183RD DISTRICT COURT OF HARRIS COUNTY, TEXAS, SITTING AS APPELLATE COURT	1a
APPENDIX B: RESPONDENT'S ORIGINAL AND AMENDED MOTIONS FOR NEW TRIAL IN FIRST TRIAL	1b
APPENDIX C: ORDER OVERRULING AMENDED MOTION FOR NEW TRIAL IN FIRST CASE	1c

INDEX OF AUTHORITIES

CASES	Page
Abney v. United States, 431 U.S. 651	12
Barbee v. State, 432 S.W.2d 78 (Tex. Crim. App. 1968)	9, 17
Battarbee v. State, 537 S.W.2d 12 (Tex. Crim. App. 1976)	2
Breed v. Jones, 421 U.S. 519	11
Bryan v. United States, 338 U.S. 552	13
Burks v. United States, 437 U.S. 1	2, 4, 8, 10, 12, 13, 14, 15, 17
Chase v. State, 573 S.W.2d 247 (Tex. Crim. App. 1978)	16
Dantzler v. State, 571 S.W.2d 536 (Tex. Crim. App. 1978)	16
Desist v. United States, 394 U.S. 244	11
Forman v. United States, 361 U.S. 416	13
Greene v. Massey, 437 U.S. 19	2, 4, 8, 10, 11, 13, 14, 15, 16, 17

CASES — Page

Jackson v. Justices of the Superior Court of Massachusetts, 549 F.2d 215 (1st Cir.), cert. den. 430 U.S. 975 11
Jackson v. Virginia, ____U.S.____, 99 S.Ct. 2781 17
Jenkins v. Delaware, 395 U.S. 213 11
Johnson v. New Jersey, 384 U.S. 719 11
Johnson v. State, 571 S.W.2d 4 (Tex. Crim. App. 1978) 15
Linkletter v. Walker, 381 U.S. 618 10
Oregon v. Hass, 420 U.S. 714 ..... 4, 10
Reeves v. State, 457 S.W.2d 924 (Tex. Crim. App. 1970) 17
Ex Parte Reynolds, 588 S.W.2d 900 (Tex. Crim. App. 1979) 8, 10, 12
Robinson v. Neil, 409 U.S. 505 ..... 11, 14
Ross v. Moffitt, 417 U.S. 600 10
Sapir v. United States, 348 U.S. 373 13
Veitch v. Superior Court, 152 Cal. Rptr. 822, cert. den. ____U.S.____, 100 S.Ct. 293 16
Waller v. Florida, 397 U.S. 387 14
White v. State, 543 S.W.2d 366 (Tex. Crim. App. 1976) ..3, 4, 9, 10
Yates v. United States, 354 U.S. 298 (1951) 13, 14

OTHER AUTHORITIES

UNITED STATES CONSTITUTION

Article VI, Supremacy Clause 3, 5, 9, 17
Amendment V, Double Jeopardy Clause 4, 9

UNITED STATES CODE

28 U.S.C. § 1257(3) 3, 4, 5, 9, 17

TEXAS CONSTITUTION

Article V, Section 26 .....3, 5, 9, 17

TEXAS CODE OF CRIMINAL PROCEDURE

Article 40.03(9) 15, 16
Article 40.09, Section 12 .....1, 3, 6, 8, 9, 10, 16, 17
Article 44.01 .....3, 6, 9, 17
Article 44.24(b) 15
Article 44.25 15

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THE STATE OF TEXAS,
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PETITION FOR WRIT OF CERTIORARI TO THE 183rd DISTRICT COURT OF HARRIS COUNTY, TEXAS

The Petitioner, State of Texas, respectfully prays that a writ of certiorari issue to review the Order of the 183rd District Court of Harris County, Texas, Sitting as an Appellate Court, entered in this proceeding on November 19, 1979.

OPINIONS AND ORDER BELOW

The 183rd District Court of Harris County, Texas, sitting as an appellate court, entered on November 19, 1979, an order setting aside the conviction in Cause No. 271,632, resulting from trial in that court, and ordering acquittal in a prior trial in Cause No. 194,899 in that court, which arose from the same incident and resulted in reversal and remanding for new trial by the Court of Criminal Appeals of Texas for insufficient evidence. The opinion of the Court of Criminal Appeals No. 50,980, remanding for new trial, is at 537 S.W.2d 12. The order of the 183rd District Court of Harris County, Texas, sitting as an appellate court, of November 19, 1979 is Appendix A, hereto.

JURISDICTION

The judgment in Cause No. 194,899 was entered on May 23, 1974. Appellant's First Amended Motion for New Trial was overruled June 27, 1974, and notice of appeal to the Court of Criminal Appeals of Texas was then given. This conviction was reversed and remanded for new trial, *Battarbee v. State,* 537 S.W.2d 12 (Tex. Crim. App. 1976). Judgment resulting from trial after reindictment in Cause No. 271,632 was entered May 19, 1978. Amended motion for new trial and motion in arrest of judgment urging application of *Burks v. United States,* 437 U.S. 1 and *Greene v. Massey,* 437 U.S. 19 was filed by respondent June 15, 1978, and overruled by the 183rd District Court of Harris County, as trial court, August 3, 1978, when notice of appeal was given by respondent. Respondent timely filed her appellate brief on September 27, 1979, and the State timely filed

its appellate brief October 19, 1979. On October 24, 1979, counsel for respondent wrote a letter to the judge of the 183rd District Court, with a copy to the clerk of said court, urging the court to set aside the instant judgment of conviction and enter a judgment of acquittal under authority of Art. 40.09 Section 12 of the Code of Criminal Procedure of Texas.

On November 19, 1979, the 183rd District Court of Harris County, sitting as an appellate court, entered an order complying with said request by respondent, setting aside the conviction in Cause No. 271,632 and ordering an acquittal in Cause No. 194,899. From this order the State of Texas had no appeal under Article V, Section 26 of the Texas Constitution and Article 44.01 of the Code of Criminal Procedure of Texas, which prohibits any appeal by the State in a criminal case and, under a plurality interpretation of the Court of Criminal Appeals of Texas, even prevents the State of Texas from seeking certiorari from the United States Supreme Court. *White v. State,* 543 S.W.2d 366 (Tex. Crim. App. 1976). Thus, the said order of the 183rd District Court, which is Appendix A hereto, is a final judgment by the highest court of the State of Texas from which the State can seek relief.

The jurisdiction of the Supreme Court of the United States is invoked under 28 U.S.C. Section 1257 (3) as to the validity of the November 19, 1979 order of the 183rd District Court of Harris County, sitting as an appellate court, and under the Supremacy Clause of Article VI of the United States Constitution as to the threshold question of the right of the State of Texas, through its prosecutors, to petition the United States

Supreme Court for Certiorari under 28 U.S.C. Section 1257(3) on a federal question.

QUESTIONS PRESENTED

1. As a threshold question, whether the plurality opinion in *White v. State,* 543 S.W.2d 366 (Tex. Crim. App. 1976) and state constitutional and statutory provisions there cited, prevents the State of Texas, by and through its prosecutors, from petitioning the United States Supreme Court in order to challenge, under *Oregon v. Hass,* 420 U.S. 714, a final holding on a federal question in a criminal case by the highest available state court.

2. Whether the 183rd District Court of Harris County, Texas, sitting as an appellate court, improperly extended the holding in *Burks v. United States,* 437 U.S. 1, as applied to the states through *Greene v. Massey,* 437 U.S. 19, in holding said cases required, because of the double jeopardy clause of the Fifth Amendment of the United States Constitution, retroactive application in a state case where a new trial had been sought in the first trial, and the second trial was completed and judgment entered before the rule of *Burks v. United States, supra,* and *Greene v. Massey, supra,* was promulgated.

CONSTITUTIONAL PROVISIONS INVOLVED

The double jeopardy clause of the Fifth Amendment of the United States Constitution:

> . . . nor shall any person be subject for the same offense as to be twice put in jeopardy of life or limb; . . .

The Supremacy Clause of Article VI of the United States Constitution:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Article V § 26 of the Texas Constitution:

> The State shall have no right of appeal in criminal cases.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 28:

Sec. 1257 (3)

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * * *
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commissions held or authority exercised under, the United States.

Code of Criminal Procedure of Texas:

Article 44.01

The State shall have no right of appeal in criminal actions.

Code of Criminal Procedure of Texas:

Article 40.09 Section 12:

It shall be the duty of the trial court to decide from the briefs and oral arguments, if any, whether the defendant should be granted a new trial by the trial court. This duty shall be performed within the period of thirty days immediately after the state's brief is filed, or if none be filed, then within the period of thirty days immediately after the last day on which the state's brief could be timely filed. Omission of the court to perform this duty within such period shall constitute refusal of the court to grant a new trial to defendant.

STATEMENT OF THE CASE

Respondent's husband, Vernon Battarbee, died April 12, 1973, of an overdose of secobarbital tablets. Respondent was indicted in Cause No. 194,899, for his murder. The indictment alleged, *inter alia*:

> Ann Battarbee . . . did kill Vernon Battarbee by causing him to swallow secobarbitol which so administered did cause the death of the said Vernon Battarbee . . .

Trial was to the court, after waiver of a jury, in the 183rd District Court of Harris County, Texas. Respondent's written extrajudicial statement, admitted in evidence, showed she administered four of the tablets to

Vernon, while he slept, knowing he had already taken at least two others. Respondent, who had experience as a nurse, did not call a doctor in time for Vernon Battarbee to receive medical aid before he died, as she had four days before under similar circumstances.

Testimony showed as few as eight of the tablets could have caused Vernon to go into irreversible shock, causing his death. Respondent was found guilty, given ten years confinement probated, filed a motion for new trial and amended motion for new trial (Appendix B hereto). The amended motion for new trial was overruled (Appendix C hereto). On appeal, the Court of Criminal Appeals of Texas held evidence was insufficient, as a matter of law, to show the four seconol tablets Appellee administered caused or resulted in Vernon Battarbee's death. The conviction in Cause No. 194,899 was reversed and the cause was remanded for new trial in accordance with requirements of Article 44.25, Code of Criminal Procedure of Texas.

Respondent was re-indicted in Cause No. 271,632, the new indictment containing a count alleging her murder of her husband by omission, in essence, her voluntary failure with malice aforethought to perform her statutory duty, as his wife, to support her husband by providing medical attention for him.

Prior to the second trial, respondent claimed former jeopardy by a plea in bar. This was overruled. The second trial was to a jury. The State elected, at the guilt or innocence phase of the bifurcated trial, to rely upon the murder by omission count. Respondent again was found guilty. On her timely election, the court assessed punishment, making it the same as resulted from the first trial, i.e., ten years imprisonment, probated.

Judgment was entered May 19, 1978. A motion for new trial was overruled on the morning of June 15, 1978. The same afternoon, with leave of court, respondent filed an amended motion for new trial and motion in arrest of judgment, claiming double jeopardy under *Burks v. United States,* 437 U.S. 1, as applied to the states by *Greene v. Massey,* 437 U.S. 19. After receiving memoranda for and against these motions, and hearing argument thereon, the issue joined being whether these cases are retroactive as applied to the instant case, the trial court denied these motions. Respondent Battarbee gave notice of appeal.

Subsequently, the Court of Criminal Appeals held, in cases including *Ex Parte Reynolds,* 588 S.W.2d 900 (Tex. Crim. App. 1979) that *Burks v. United States, supra* and *Greene v. Massey, supra,* are retroactive.

On September 27, 1979, respondent timely filed her appellate brief. The State's brief was timely filed October 19, 1979. On October 24, 1979, in a letter to the judge of the 183rd District Court of Harris County, Texas, with a copy to the clerk of said court, counsel for respondent urged the court to act, under authority of Article 40.09, Section 12 of the Code of Criminal Procedure of Texas, to set aside the instant conviction and order acquittal. On November 19, 1979, the 183rd District Court, sitting as an appellate court and considering the appellate briefs of respondent and the State, entered an order holding that, because the court is bound by decisions of the Court of Criminal Appeals of Texas, it must hold that *Burks v. United States, supra,* as applied to the states by *Greene v. Massey, supra,* is retroactive, and under the double jeopardy clause of the Fifth Amendment to the United

States Constitution, respondent was entitled to the relief sought. November 19, 1979, a Monday, was within the 30 day period allowed by Article 40.09 § 12 C.C.P. *Barbee v. State,* 432 S.W.2d 78 (Tex. Crim. App. 1968).

The court, acting as an appellate court, ordered, as a requirement of federal law, that the instant conviction in Cause No. 271,632 be set aside, and ordered acquittal in Cause No. 194,899. A copy of this order is Appendix A hereto.

Pursuant to Article V, Section 26 of the Texas Constitution and Article 44.01 of the Texas Rules of Criminal Procedure, the State of Texas has no appeal in a criminal case, and this is a final judgment by the highest court which has jurisdiction in this case.

REASONS FOR GRANTING THE WRIT

Threshold Question

The Texas Court of Criminal Appeals, by a plurality opinion in *White v. State,* 543 S.W.2d 366 (Tex. Crim. App. 1976), has held that the State of Texas cannot petition the United States Supreme Court for Certiorari in a criminal case because, under Article V Section 26 of the Texas Constitution and Article 44.01 of the Texas Code of Criminal Procedure, the State has no right of appeal in a criminal case. Judge Douglas, dissenting, noted that the Supremacy Clause of Article VI of the United States Constitution controls.

United States Code, Title 28, Sec. 1257(3), provides the writ of certiorari as the vehicle for discretionary review by this Court of final judgments or decrees rendered by the highest court of a state in which a decision could

be had. The right to seek certiorari in this Court is not granted by any state and exists by virtue of the above cited federal statute, with or without consent of the state whose judgment is sought to be reviewed. *Ross v. Moffitt,* 417 U.S. 600, 617.

Oregon v. Hass, 420 U.S. 714, 719, makes it clear that a state may not impose a greater restriction as a federal rule than the United States Supreme Court imposes. This rule is reduced to a mere recommendation to Texas state courts, with their compliance in criminal cases never to be tested by petition for certiorari to the United States Supreme Court, in the plurality opinion of *White v. State, supra.*

The Instant Question

The final decision of the 183rd District Court of Harris County, the highest Texas court in which the state can get a decision, *White v. State, supra,* sitting as an appellate court under Article 40.09 Section 12 C.C.P., has held *Burks v. United States, supra,* and *Greene v. Massey, supra,* to be retroactive. This court made it clear it was changing its prior decision of prospectivity in this case solely because of the decision of the Texas Court of Cirminal Appeals in three cases including *Ex Parte Reynolds,* 588 S.W.2d 900 (Tex. Crim. App. 1979).

The fact that the second conviction in the instant case was not beyond the reach of direct appeal when *Greene v. Massey, supra,* was announced does not make the issue of retroactivity or prospectivity inapplicable.

The requirement of *Linkletter v. Walker,* 381 U.S. 618 at 622, that all rights of appeal and certiorari must have been exhausted by date of the *Mapp* decision in order to avoid applying *Mapp* retroactively, has long

been abandoned as a rigid rule on retroactivity. *Johnson v. New Jersey,* 384 U.S. 719 at 733, *Desist v. United States,* 394 U.S. 244 at 255, *Jenkins v. Delaware,* 395 U.S. 213, 218.

In *Jackson v. Justices of Superior Court of Mass.,* 549 F.2d 215 at 216-217, cert. den. 430 U.S. 975, the "point of reliance" dividing prospectivity from retroactivity as to *Breed v. Jones,* 421 U.S. 519, was held to be termination of the juvenile proceeding, after which the Commonwealth of Massachusetts could not have proceeded further against the petitioners under the *Breed* rule.

In the case at bar, the cutoff time between prospectivity would properly be the date of the reversing decision, or the mandate thereon, after which the state could not have further proceeded under the *Greene v. Massey* rule. At the latest, the date when the second trial began should be the cutoff time, as in *Johnson v. New Jersey, supra.*

New interpretations of the double jeopardy clause are not per se retroactive. *Robinson v. Neil,* 409 U.S. 505; *Jackson v. Justices of the Superior Court of Massachusetts,* 549 F.2d 215 (1st Cir.), cert. den. 430 U.S. 975.

Tests for retroactivity of new constitutional standards are: (a) purpose to be served (b) extent of reliance on the old standards, and (c) effect of retroactive application. *Desist v. United States,* 394 U.S. 244, 249.

Foremost among these factors is the purpose to be served. *Desist, supra.*

(a) Purpose to be Served

The purpose of the double jeopardy protection is to provide a guaranty against being *put to trial* a second

time. It prevents the personal strain, public embarrassment and expense of a criminal trial more than once for the same offense. *Abney v. United States,* 431 U.S. 651.

This purpose cannot be accomplished after the second trial has taken place.

Judge Douglas, in his dissenting opinion in *Ex Parte Reynolds,* 588 S.W.2d 900, 905 (Tex. Crim. App. 1979), stated the correct rationale as follows:

> Petitioner has already suffered the consequences of the second trial process. Double jeopardy does not effect the validity of the fact finding process. Thus, the only possible interest which could be furthered by retroactivity would be to elevate the Double Jeopardy Clause to the highest magnitude of constitutional rights such that any violation of it is so fundamental that it requires full and automatic retroactive application. . . . The Supreme Court in Robinson held that the Double Jeopardy Clause did not protect such a fundamental right, and there is no reason to elevate the protection beyond the current Supreme Court interpretations.

Respondent Battarbee has had her second trial. She is now free on bail. She has been granted probation. There will be no added burden of bail or detention if prospectivity is applied. The only result favorable to her from application of retroactivity will be the conversion of a reversing and remanding for new trial decision to an acquittal order, which deals with the fact finding process. There will be no achievement of the primary purpose of jeopardy, which is to prevent re-trial.

(b) Extent of Reliance on the Old Standard

Anticipation by the Texas legislature and judiciary of application to the states of the rule of *Burks v. United*

States, supra, as is required by *Greene v. Massey, supra,* would have required a complete disregard of the rule of *stare decisis.*

The *Burks opinion* cites and discusses the evolution of the rule here applicable through *Bryan v. United States,* 338 U.S. 552; *Sapir v. United States,* 348 U.S. 373 (including the concurring opinion by Mr. Justice Douglas); *Yates v. United States,* 354 U.S. 298, and *Forman v. United States,* 361 U.S. 416. *Burks* then stated, 98 S.Ct. 2141 at 2146:

> After the *Bryan-Forman* line of decisions at least one proposition emerged: a defendant who *requests* a new trial as one avenue of relief may be required to stand trial again, even when his conviction was reversed due to failure of proof at the first trial. Given that petitioner here appealed from a denial of a motion for a new trial — although he had moved for acquittal during trial — our prior cases would seem to indicate that the Court of Appeals had power to remand on the terms it ordered. To reach a different result will require a departure from those holdings.

Respondent Battarbee filed her original and amended tions for new trial in the proceedings of her first trial, Cause No. 194,899. They are at pages 231-233 of the appellate record prepared in Cause No. 271,632. The motions for new trial in the proceedings of her first trial, texts of those motions are Appendix B hereto. The court's order overruling the said amended motion is at page 237 of the same appellate record and the text thereof is Appendix C hereto.

This is not an instance in which the State could be expected to have reasonable anticipation of a change.

As applied to the case at bar, any anticipation that the federal rule which was widely accepted and recognized might be applied to the states would have made no difference at all. This case conforms to the then federal rule.

The *Greene* decision makes it clear that this rule was recognized and applied by the Fifth Circuit Court of Appeals, which has jurisdiction including Texas.

Robinson v. Neil, 409 U.S. 505, at 510, pointed out that *Waller v. Florida,* 397 U.S. 387, there held retrospective, cannot be said to have marked a departure from past decisions of the United States Supreme Court.

Robinson, supra, stated at 509:

> The element of reliance embodied in the *Linkletter* analysis will not be wholly absent in the case of constitutional decisions not related to trial procedure, as indeed this case when contrasted with *Furman* illustrates.

If reliance is ever to have weight in a matter of retroactivity or prospectivity of double jeopardy, then it should have the maximum allowable weight in the case at bar.

(c) Effect of Retroactive Application

The rule of *Burks v. United States, supra,* as applied to the states by *Greene v. Massey, supra,* has greatly expanded the jurisdiction of Texas appellate courts in criminal cases. The jurisdiction of a United States Court of Appeals, under 28 U.S.C.A. Section 2106, is a general appellate jurisdiction, with authority to enter any orders which may be just under the circumstances. This includes the authority to order acquittal. *See Yates, supra.* The

authority of the Texas Court of Criminal Appeals, on the contrary, except for its great and virtually unlimited writ powers, is specific.

Article 40.03 of the Code of Criminal Procedure of Texas reads, in pertinent part:

> New trials, in cases of felony, shall be granted the defendant for the following causes, and for no other:
>
> * * * *
>
> (9) Where the verdict is contrary to law and evidence.

Article 44.24(b), Code of Criminal Procedure of Texas, reads:

> The Court of Criminal Appeals may affirm the judgment of the court below, or may reverse and remand for a new trial, or may reverse and dismiss the case, or may reform and correct the judgment, as the law and nature of the case may require.

Article 44.25, Code of Criminal Procedure of Texas, reads:

> The Court of Criminal Appeals may reverse the judgment in a criminal action, as well upon the law as upon the facts. A cause reversed because the verdict is contrary to the evidence shall be remanded for new trial.

Citing *Burks v. United States, supra,* and *Greene v. Massey, supra,* the Texas Court of Criminal Appeals held Article 44.25, *supra,* unconstitutional in *Johnson v. State,* 571 S.W.2d 4, 6 (Tex. Crim. App. 1978), at fn. 2.

Thus, the Texas appellate courts in criminal cases, formerly prohibited by statute from ordering an acquittal on insufficient evidence, have, by the rule of *Greene v. Massey, supra,* received this power.

If retrospectivity is applied to this new power, it is impossible to conceive of the tremendous amount of post-conviction relitigation which will result in state and federal courts in Texas.

In the case at bar, Respondent filed, at the end of each of her trials, a motion for new trial couched in the language of Article 40.03(9), Texas Code of Criminal Procedure, i.e., that a new trial should be granted because the judgment is contrary to the law and evidence. This common form, when it has been used as basis for agreed granting of a new trial prior to re-entry of a plea on a plea bargaining basis, will almost certainly be claimed as sufficient basis for post-conviction order of acquittal. *Chase v. State,* 573 S.W.2d 247 (Tex. Crim. App. 1978), applying the *Greene v. Massey* rule, held that when a trial court, acting as appellate court under Article 40.09 Section 12 of the Code of Criminal Procedure, grants a new trial on claim of insufficient evidence, acquittal must result. Such a claim, based upon the granting of a motion for new trial, apparently similar to the original motion for new trial filed by Respondent in the case at bar, was made in *Veitch v. Superior Court,* 152 Cal. Rptr. 822, cert. den. ____U.S.____, 100 S.Ct. 293.

The Texas rule thus far has been that sufficiency of evidence cannot be collaterally attacked. *Dantzler v. State,* 571 S.W.2d 536 (Tex. Crim. App. 1978). But a federal district court, in habeas corpus proceedings as to validity of a state conviction, must determine sufficiency of the evidence, not merely whether there was any evidence to support the conviction. *Jackson v. Virginia,* ____U.S.____, 99 S.Ct. 2781.

After 1965, the Texas Court of Criminal Appeals did not review sufficiency of evidence unless it was assigned as error. *Barbee v. State,* 432 S.W.2d 78 (Tex. Crim. App. 1968); *Reeves v. State,* 457 S.W.2d 924 (Tex. Crim. App. 1970). During this time, the docket of that court advanced from cause numbers in the 37,000's in 1965 to the 58,000's in 1978, *see* applicable Southwest Second reporters. This is a difference of some 21,000 cases in which sufficiency of evidence could now be re-tried, quite likely in federal court.

CONCLUSION

Under the Supremacy Clause of Article VI of the United States Constitution, and 28 U.S.C. Section 1257 (3), the State of Texas has a right to petititon for certiorari in a criminal case, on a federal question, and this Court has jurisdiction to grant, in its discretion, such petition, despite Article V Section 26 of the Texas Constitution, and Article 44.01 of the Texas Code of Criminal Procedure.

The final decision of the highest Texas court herein improperly interprets and extends this Court's rule in *Burks v. United States, supra,* as applied to the states through *Greene v. Massey, supra,* by applying it retroactively. It is respectfully submitted that a writ of certiorari should issue to review the herein final order of the 183rd District Court of Harris County, Texas, sitting as an appellate court under authority of Article 40.09 Section 12 of the Texas Code of Criminal Procedure.

This order should be withdrawn, and the conviction in Cause No. 271,632 should be reinstated, with full right of Respondent then to proceed to the Court of Criminal Appeals of Texas on any matter other than the retroactivity here in issue.

Respectfully submitted,

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January 31, 1980

APPENDIX A

NO. 271,632

IN THE 183RD DISTRICT COURT
OF HARRIS COUNTY, TEXAS

ANN BATTARBEE

v.

THE STATE OF TEXAS

ORDER OF THE 183RD DISTRICT COURT OF HARRIS COUNTY, TEXAS, SITTING AS APPELLATE COURT

Pursuant to the duty of this court under Article 40.09, § 12 of the Code of Criminal Procedure of Texas, this court as an appellate court, here considers the briefs of Appellant Ann Battarbee and of the State of Texas in the above styled and numbered cause.

Appellant contends she is entitled to reversal of the conviction herein because her prior conviction for the same offense in Cause No. 194,899 in this District Court was reversed by the Court of Criminal Appeals of Texas for insufficiency of evidence. The key to Appellant's position is her claim that *Burks v. United States,* 437 U.S. 1, as applied to the states in *Greene v. Massey,* 437 U.S. 19, is retroactive.

This court finds from the record in this cause that the prosecution in Cause No. 194,899 in this court was based on the same incident which is the basis of the prosecution in this cause. This court finds from the record that prose-

cution in Cause No. 194,899 resulted, on May 19, 1976, in reversal of conviction for insufficient evidence and remanding for new trial by the Court of Criminal Appeals of Texas in *Battarbee v. State,* 537 S.W.2d 12, Appellant's motion for new trial having been timely filed and overruled before she appealed. The rule of *Burks v. United States, supra,* as applied to the states by *Greene v. Massey, supra,* had not then been promulgated.

This court finds from the record that the instant case was tried, a guilty verdict rendered, and judgment entered prior to June 14, 1978, when *Burks v. United States, supra,* as applied to the states through *Greene v. Massey, supra,* was promulgated. On the morning of June 15, 1978, the defense motion for new trial was denied. On the afternoon of that same day, the defense, with leave of court, filed its amended motion for new trial and motion in arrest of judgment, claiming relief under *Burks v. United States, supra,* and *Greene v. Massey, supra.* These motions, after thorough consideration, this court denied, believing that the *Burks v. United States* and *Greene v. Massey* rule was not retrospective.

The Texas Court of Criminal Appeals has held that the rule of *Burks v. United States, supra,* as applied to the states by *Greene v. Massey, supra,* requires acquittal on reversal for insufficient evidence, and is retroactive. *Ex Parte Mixon,* 583 S.W.2d 378, *Ex Parte Dixon,* 583 S.W.2d 793, *Ex Parte Reynolds,* Texas Court of Criminal Appeals Cause No. 60,647, Opinion of June 20, 1979, State's Motion for Leave to File Motion for Rehearing overruled September 19, 1979.

This court, whether functioning as appellate court or trial court, is bound by the decisions of the Court of

Criminal Appeals of Texas, and, therefore, holds retroactive the rule in *Greene v. Massey, supra,* that reversal for insufficient evidence by a state appellate court, in a criminal case, is jeopardy preventing retrial, under the Fifth Amendment of the United States Constitution.

For the above reasons, this court, functioning as an appellate court, enters its order substantially in the language used by the Texas Court of Criminal Appeals in *Ex Parte Reynolds, supra,* as follows:

The judgment against Appellant in Cause No. 194,899 in the 183rd Judicial District Court of Harris County (Appellant's first conviction) is ordered reformed to show an acquittal, the judgment against her in Cause No. 271,632, in the 183rd Judicial District Court of Harris County (Appellant's second and instant conviction) is set aside, and she is ordered discharged from any confinement or supervision by probation officers under said judgment.

It is so ordered.

Signed this 19th day of November, 1979.

/s/ JOSEPH M. GUARINO
Joseph M. Guarino
Judge Presiding
183rd District Court
Harris County, Texas

APPENDIX B

NO. 194899

IN THE 183RD DISTRICT COURT
OF HARRIS COUNTY, TEXAS
MAY TERM, A.D. 1974

THE STATE OF TEXAS

v.

LILLIE ANN BATTARBEE

DEFENDANT'S ORIGINAL MOTION
FOR A NEW TRIAL

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the Defendant in the above numbered and entitled cause and respectfully moves the Court to set aside its judgment and grant a new trial for the following grounds and reasons, to-wit:

> For the reason that the Judgment of the Court is contrary to the law and evidence in said Cause.

WHEREFORE, premises considered, the Defendant prays that this motion for a new trial be granted for the reasons stated above.

Respectfully submitted,

/s/ DICK DEGUERIN
Attorney For The Defendant
512 First National Life Bldg.
Attorney's Address & Phone No.
224-9321

NO. 194,899

IN THE DISTRICT COURT
OF HARRIS COUNTY, TEXAS
183RD JUDICIAL DISTRICT

THE STATE OF TEXAS

v.

ANN BATTARBEE

FIRST AMENDED MOTION FOR NEW TRIAL

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES Defendant, Lillie Ann B. Batterbee, and respectfully requests the Court to grant her new trial herein and for grounds would show as follows:

I.

Defendant did not voluntarily waive her right to jury trial, but was induced, pressured and coerced into waiving her right to jury trial. In support hereof Defendant attaches hereto her affidavit and requests that she be allowed to present sworn testimony in support hereof.

II.

Defendant was not allowed to testify in her own behalf, although she wanted to testify in her own behalf and her testimony would have exonerated her. In support hereof Defendant attaches her affidavit and further requests to be allowed to present sworn testimony in support hereof.

III.

The trial court committed material error calculated to injure the rights of the defendant when it allowed the prosecutor to delete a portion of the sentence in Defendant's "voluntary statement" prior to introducing said statement. The deletion completely changed the meaning and significance of said sentence. Prior to the deletion, the sentence referred to "four Seconal capsules" but after the deletion the sentence referred to simply "Seconal Capsules". Four Seconal Capsules is not a lethal dose and thus the prosecution changed the meaning of said statement as it was given prior to its introduction. In support hereof Defendant requests permission of the Court to present sworn testimony.

IV.

The verdict of the Court is contrary to the law and the evidence of the case.

WHEREFORE, PREMISES CONSIDERED, Defendant prays for evidentiary hearing on this Motion for New Trial, and that upon said hearing the verdict of the Court be set aside and she be granted new trial herein.

Respectfully submitted,

FOREMAN & DeGUERIN

/s/ DICK DeGUERIN
Dick DeGuerin
Attorneys for Defendant
512 First National Life Bldg.
Houston, Texas 77002
224-9321

APPENDIX C

NO. 194,899

IN THE 183RD DISTRICT COURT
OF HARRIS COUNTY, TEXAS
MAY TERM, A.D. 1974

THE STATE OF TEXAS

v.

ANN BATTERBEE

On this the 27th day of June A.D. 1974, came on to be heard the First Amended Motion of the Defendant Ann Batterbee, for a new trial in the above entitled and numbered cause; and appeared the parties, the State by her District Attorney, and the Defendant, Ann Batterbee, in person and by counsel, and said Motion and controversion of the State thereto, and the argument of counsel thereon, having been heard by the Court, the Court is of the opinion that the said Motion should be overruled and refused.

It is THEREFORE, CONSIDERED, ORDERED AND ADJUDGED by the Court that the said Motion for a New Trial be refused and overruled to which order and judgment of the Court the Defendant, Ann Batterbee, excepts.

Supreme Court, U. S.
FILED
MAY 9 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

NO. 79-1199

THE STATE OF TEXAS,
Petitioner

v.

ANN BATTARBEE,
Respondent

RESPONDENT, ANN BATTARBEE'S RESPONSE TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI

FOREMAN, DEGUERIN & DEGEURIN
DICK DEGUERIN
609 Fannin, Suite 1111
Houston, Texas 77002
(713) 224-9321
Attorneys for Respondent

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

SUBJECT INDEX

	Page
RESPONSE TO PETITION FOR WRIT OF CERTIORARI.	2
CERTIFICATE OF SERVICE	7
APPENDIX A (Memoranda In Support Of Defendant's Motion For New Trial And Motion In Arrest Of Judgment)	9
APPENDIX B (Appellant's Brief On Appeal)	15
APPENDIX C (State's Appellate Brief)	22

LIST OF AUTHORITIES

CASES	Page
Battarbee v. State, 537 S.W.2d 12 (Tex. Cr. App. 1976)	3
Breed v. Jones, 421 U.S. 519, 95 S.Ct. 1779, 44 L.Ed.2d 346 (1975)	5, 6
Burks v. United States, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1	2, 3, 4, 6, 7
Desist v. United States, 394 U.S. 244, 89 S.Ct. 1030, 22 L.Ed.2d 248 (1969)	4
Ex Parte Dixon, 583 S.W.2d 793 (Tex. Cr. App. 1979)	3, 7
Ex Parte Mixon, 583 S.W.2d 378 (Tex. Cr. App. 1979)	3, 7
Ex Parte Reynolds, 588 S.W.2d 900 (Tex. Cr. App. 1979)	3, 7
Greene v. Massey, 437 U.S. 19, 98 S.Ct. 2151, 57 L.Ed. 15	2, 3, 4, 7
Holt v. Black, 550 F.2d 1061 (CA 6, 1977)	6
Jackson v. Justices of the Superior Court of Massachusetts, 549 Fed.2d 215 (CA 1, 1977)	5, 6
Linkletter v. Walker, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965)	4
Robinson v. Neil, 409 U.S. 505, 93 S.Ct. 876, 35 L.Ed.2d 29 (1973)	4, 5
White v. State, 543 S.W.2d 366 (Tex. Cr. App. 1976)	2

	Page
UNITED STATES CONSTITUTION	
Article 1, Section 14	3
Fifth Amendment	3
TEXAS CONSTITUTION	
Article 5, Section 26	1
CODE OF CRIMINAL PROCEDURE OF TEXAS	
Article 40.09, Section 12, V.A.C.C.P.	3
Article 44.01, V.A.C.C.P.	2

IN THE

Supreme Court of the United States

NO. _____

THE STATE OF TEXAS,
Petitioner

v.

ANN BATTARBEE,
Respondent

RESPONDENT, ANN BATTARBEE'S RESPONSE TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI

---

1. THE STATE OF TEXAS IS PROHIBITED BY ITS CONSTITUTION AND LAWS FROM APPEALING A CRIMINAL CASE.

On February 4, 1980, the State of Texas, represented by the District Attorney of Harris County, Texas, filed a Petition for Writ of Certiorari to the 183rd Judicial District Court of Harris County, Texas. Texas constitutional and statutory law prohibits such action. Article 5, Section 26 of the Texas Constitution provides:

> "The State [of Texas] shall have no right of appeal in criminal cases."

Article 44.01, V.A.C.C.P. provides:

> "The State shall have no right of appeal in criminal actions."

In *White v. State,* 543 S.W.2d 366 (Tex. Cr. App. 1976), the Court of Criminal Appeals of the State of Texas held:

> "We do not dispute the validity or binding effect of the Supreme Court's holding in Texas v. White [423 U.S. 67 (1975)]. However, we have concluded that the State of Texas violated the provisions of its own constitution in pursuing the appeal of this case to that court. * * *
>
> * * * A petition for certiorari in the Supreme Court in a case such as the one before us is an appeal of a criminal case; such appeals are expressly forbidden by Article 5, Section 26 of the Texas Constitution and can no longer be allowed.
>
> * * * Accordingly, we hold that the State may not in any manner appeal a criminal case from this court to the Supreme Court of the United States." *White v. State,* 543 S.W.2d at pp. 367 & 369.

The action of the district attorney of Harris County in filing a Petition for Writ of Certiorari herein is a violation of the Constitution, Statutes and case law of the State of Texas. Thus the Petition for Writ of Certiorari should be dismissed.

2. THE TRIAL COURT CORRECTLY HELD THAT RESPONDENT HAD BEEN TWICE PLACED IN JEOPARDY.

On June 14, 1978 the United States Supreme Court rendered opinions in *Burks v. United States,* 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1, and *Greene v. Massey,*

437 U.S. 19, 98 S.Ct. 2151, 57 L.Ed. 15. Respondent had not yet been sentenced. The following day, June 15, 1978 the trial court, as yet unaware of Burks and Greene, overruled Defendant's Motion for New Trial. Later that day, however, Respondent obtained leave of court to file an Amended Motion for New Trial in light of Burks and Greene. That Amended Motion for New Trial was overruled.

Respondent timely filed an appellate brief, the major thrust of which was that she had been twice placed in jeopardy: The Texas Court of Criminal Appeals reversed her first conviction for killing her husband, on the basis of insufficient evidence, *Battarbee v. State,* 537 S.W.2d 12 (Tex. Cr. App. 1976). Over her repeated and strenuous "double jeopardy" objections, founded on the Fifth Amendment to the United States Constitution and on Article 1, Section 14 of the Texas Constitution, she was again tried and convicted.

Meanwhile, the Texas Court of Criminal Appeals held that the double jeopardy rule of *Burks v. United States* and *Greene v. Massey* are to be given retroactive application. *Ex Parte Mixon,* 583 S.W.2d 378 (Tex. Cr. App. 1979); *Ex Parte Reynolds,* 588 S.W.2d 900 (Tex. Cr. App. 1979); *Ex Parte Dixon,* 583 S.W.2d 793 (Tex. Cr. App. 1979).

The State filed a brief in the trial court conceding that Respondent's brief was a correct statement of the law. Thereafter, the trial court, pursuant to its authority and duty under Article 40.09, Section 12 of the Code of Criminal Procedure of Texas, set aside Respondent's second conviction and entered a judgment of acquittal. The State made no effort to prevent the trial court from taking such action.

Respondent's second conviction was not final as of the date of the decision in *Burks v. United States* and *Greene v. Massey*. Defendant's original motion for new trial was still pending, and the trial court gave leave to file an amended motion for new trial so as to consider *Burks v. United States* and *Greene v. Massey*. Thus the question of retroactivity of *Burks v. United States* and *Greene v. Massey* should not be pertinent. Nonetheless, the Supreme Court has consistently held that double jeopardy decisions are to be given retrospective application. *Robinson v. Neil,* 409 U.S. 505, 93 S.Ct. 876, 35 L.Ed.2d 29 (1973).

Until 1965 *all* constitutional decisions of the Supreme Court had been given retrospective effect. But in 1965 in *Linkletter v. Walker,* 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965), the Supreme Court held that with respect to new constitutional interpretations involving criminal rights the Constitution neither prohibits nor requires retrospective effect. The court went on, in *Linkletter*, and in *Desist v. United States,* 394 U.S. 244, 89 S.Ct. 1030, 22 L.Ed.2d 248 (1969) and established guide lines for determining which constitutional rules were to be accorded retrospective effect and which prospective effect only. Generally, the *Linkletter* exception, authorizing prospective effect only, deals with those constitutional interpretations bearing on the use of evidence or on a particular mode of trial, i.e. procedural rules. But in *Robinson v. Neil* the Supreme Court held:

> "The prohibition against being placed in double jeopardy is likewise not readily susceptible of analysis under the Linkletter line of cases. Although the court has not handed down a fully recent opinion on retroactivity of *Benton v. Maryland,* it has indicated that it is retroactive without examination of the Linkletter criteria. *North Carolina v. Pearce,* 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969); *Ashe v. Swenson,* 397 U.S. 436, 437, Note 1, 90 S.Ct. 1189, 1191, 25 L.Ed.2d 469 (1970). These decisions do not directly control the question of whether *Waller* should be given retrospective effect but they bear upon its disposition.
>
> The guarantee of double jeopardy is significantly different from procedural guarantees held in the *Linkletter* line of cases to have prospective effect only. While this guarantee, like the others, is a constitutional right of the criminal defendant, its practical result is to prevent a trial from taking place at all, rather than to prescribe procedural rules that goven the conduct of trial.
>
> * * * We hold, therefore, that our decision in *Waller v. Florida,* is to be accorded full retroactive effect." *Robinson v. Neil,* 93 S.Ct. at 878, 879.

Thus it is clear that the Supreme Court intends for its double jeopardy decisions to be given full retrospective effect. Indeed, in two Federal Circuit Court cases decided since *Robinson v. Neil,* retroactivity is recognized. In *Jackson v. Justices of the Superior Court of Massachusetts,* 549 Fed.2d 215 (CA 1, 1977), the United States Court of Appeals for the First Circuit dismissed on procedural grounds a class action suit which would have enjoined all State proceedings against juveniles who had previously been prosecuted as juveniles. Although at first blush this case seems to hold against retroactive application of *Breed v. Jones,* 421 U.S. 519, 95 S.Ct. 1779, 44 L.Ed.2d 346 (1975), which held that the double jeopardy clause was offended by first prosecuting a person as a juvenile, then prosecuting the same person as an

adult based on the same accusation, it is clear that the majority in that court recognized the probable retroactive application of *Breed v. Jones* but simply held that the class action suit by which petitioners sought to enjoin future prosecutions was not the appropriate remedy. The chief judge of the First Circuit, in a dissent, said:

> "I recognize the undesirable consequences of holding *Breed* retroactive, but I think Mr. Justice Rehnquist's opinion for a unanimous court in *Robinson v. Neil* * * * virtually compels the conclusion that *Breed* is retroactive. * * * The court refused to apply the three pronged *Linkletter* desist criteria reasoning that they had no applicability to rules that in practice precent a trial from taking place at all, rather than merely prescribing procedural rules." *Jackson v. Justices of the Superior Court of Massachusetts,* 549 F.2d 215, at p. 22.

In *Holt v. Black,* 550 F.2d 1061 (CA 6, 1977), the Sixth Circuit squarely held that the double jeopardy holding of *Breed v. Jones* must be given retrospective application.

Thus it is clear that *Burks v. United States* and *Greene v. Massey* are to be given retrospective application. Retroactivity is not a question in the instant case, since Defendant's motion for new trial was pending at the time the Supreme Court decided *Burks v. United States* and *Greene v. Massey,* but even if the retroactivity of those cases is deemed significant, it is clear from *Robinson v. Neil* that double jeopardy decisions must be given retroactive application.

The Texas Court of Criminal Appeals had agreed, and at the time the trial court herein set aside the conviction

and entered a judgment of acquittal, the Court of Criminal Appeals had already rendered its decision, based on both State and Federal grounds, that *Burks v. United States* and *Greene v. Massey* are to be given retrospective application. *Ex Parte Dixon,* supra; *Ex Parte Mixon,* supra; *Ex Parte Reynolds,* supra.

The trial court was correct and the Petition for Writ of Certiorari should be denied, or dismissed.

Respectfully submitted,

FOREMAN, DEGUERIN & DEGEURIN

By: Dick DeGuerin

DICK DEGUERIN
Attorneys for Respondent
609 Fannin, Suite 1111
Houston, Texas 77002
(713) 224-9321

CERTIFICATE OF SERVICE

I, Dick DeGuerin, hereby certify that a true and correct copy of the foregoing "Respondent Ann Battarbee's Response to Petitioner's Petition for Writ of Certiorari ~~and Motion to Dismiss Petition for Writ of Certiorari~~" has been mailed to the office of the District Attorney of Harris County, Texas, 201 Fannin, Houston, Texas 77002, this ~~21~~1st day of ~~April~~ May, 1980.

Dick DeGuerin

DICK DEGUERIN

APPENDIX A

NO. 271,632

IN THE DISTRICT COURT OF
HARRIS COUNTY, TEXAS
183RD JUDICIAL DISTRICT

THE STATE OF TEXAS

vs.

ANN BATTARBEE

MEMORANDA IN SUPPORT OF DEFENDANT'S MOTION FOR NEW TRIAL AND MOTION IN ARREST OF JUDGMENT

TO THE HONORABLE JUDGE OF SAID COURT:

1. On June 14, 1978 the United States Supreme Court rendered opinions in *Burks v. United States,* ____U.S. ____, 23 Criminal Law Reporter 3098; and *Greene v. Massey,* ____U.S.____, 23 Criminal Law Reporter 3102. These cases squarely hold that the Fifth Amendment's double jeopardy clause precludes a second trial once a reviewing court has determined that the evidence introduced at the first trial was insufficient to sustain a guilty verdict, and that this principal is fully applicable to State criminal proceedings. Cf. *Benton v. Maryland,* 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969), which held that the double jeopardy clause of the Fifth Amendment is applicable to the States through the Fourteenth Amendment.

2. At the time the Supreme Court decided *Burks v. United States* and *Greene v. Massey,* Defendant's motion

for new trial herein was pending and set for hearing on June 15, 1978. On the morning of June 15, 1978 this court overruled Defendant's motion for new trial, both the court and counsel for defendant being unaware of the previous day's Supreme Court rulings. However, later that same afternoon counsel for defendant learned of *Burks v. United States* and *Greene v. Massey,* and obtained this court's permission to file an amended motion for new trial and motion in arrest of judgment. Thus said amended motion for new trial and motion in arrest of judgment were timely filed, Cf. Article 40.05, V.A.C.C.P.:

> "* * * but for good cause shown the time for filing or amending may be extended by the court * * *".

3. Defendant's original conviction herein was reversed by the Court of Criminal Appeals on the grounds that the evidence was legally insufficient to sustain her conviction. *Battarbee v. State,* 537 S.W.2d 12 (Tex. Cr. App. 1976):

> "* * * the evidence considered in the light most favorable to the finding of guilt by the trial court is insufficient as a matter of law."

Defendant has consistently urged her plea in bar and her special plea contending that the double jeopardy clause of the Fifth Amendment to the United States Constitution, and the double jeopardy clause of Article 1, Section 14, of the Texas Constitution should have prevented her retria herein. Thus *Burks v. United States* and *Greene v. Massey,* as applied to the instant case, requires that Defendant's second conviction be set aside and that her

plea in bar and special plea be sustained and the State prohibited from trying her again.

4. In the instant case the State now contends that *Burks v. United States* and *Greene v. Massey* should not be given retrospective application. However, Defendant's conviction is not yet final, and as of the date of the decision of *Burks v. United States* and *Greene v. Massey* Defendant's original motion for new trial was still pending, thus the question of retroactivity of Burks v. United States and Greene v. Massey is not pertinent. Nonetheless, the Supreme Court has consistently held that double jeopardy decisions are to be given retrospective application. *Robinson v. Neil,* 409 U.S. 505, 93 Sup. Ct. 876, 35 L.Ed.2d 29 (1973).

Until 1965 *all* constitutional decisions of the Supreme Court had been given retrospective effect. But in 1965 in *Linkletter v. Walker,* 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965), the Supreme Court held that with respect to new constitutional interpretations involving criminal rights the Constitution neither prohibits nor requires retrospective effect. The court went on, in *Linkletter,* and in *Desist v. United States,* 394 U.S. 244, 89 S.Ct. 1030, 22 L.Ed.2d 248 (1969) and established guide lines for determining which constitutional rules were to be accorded retrospective effect and which prospective effect only. Generally, the *Linkletter* exception, authorizing prospective effect only, deals with those constitutional interpretations bearing on the use of evidence or on a particular mode of trial, i.e. procedural rules. But in *Robinson v. Neil* the Supreme Court held:

> "The prohibition against being placed in double jeopardy is likewise not readily susceptible of analy-

sis under the Linkletter line of cases. Although the court has not handed down a fully recent opinion on retroactivity of *Benton v. Maryland,* it has indicated that it is retroactive without examination of the Linkletter criteria. *North Carolina v. Pearce,* 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969); *Ashe v. Swenson,* 397 U.S. 436, 437, Note 1, 90 S.Ct. 1189, 1191, 25 L.Ed.2d 469 (1970). These decisions do not directly control the question of whether *Waller* should be given retrospective effect but they bear upon its disposition.

The guarantee of double jeopardy is significantly different from procedural guarantees held in the *Linkletter* line of cases to have prospective effect only. While this guarantee, like the others, is a constitutional right of the criminal defendant, its practical result is to prevent a trial from taking place at all, rather than to prescribe procedural rules that govern the conduct of trial.

> * * * We hold, therefore, that our decision in *Waller v. Florida,* is to be accorded full retroactive effect." *Robinson v. Neil,* 93 S.Ct. at 878, 879.

Thus it is clear that the Supreme Court intends for its double jeopardy decisions to be given full retrospective effect. Indeed, in two Federal Circuit Court cases decided since *Robinson v. Neil,* retroactivity is recognized. In *Jackson v. Justices of the Superior Court of Massachusetts,* 549 Fed.2d 215 (CA 1, 1977), the United States Court of Appeals for the First Circuit dismissed on procedural grounds a class action suit which would have enjoined all State proceedings against juveniles who had previously been prosecuted as juveniles. Although at first blush this case seems to hold against retroactive application of *Breed v. Jones,* 421 U.S. 519, 95 S.Ct. 1779, 44 L.Ed. 2d 346 (1975), which held that the double jeopardy

clause was offended by first prosecuting a person as a juvenile, then prosecuting the same person as an adult based on the same accusation, it is clear that the majority in that court recognized the probable retroactive application of *Breed v. Jones* but simply held that the class action suit by which petitioners sought to enjoin future prosecutions was not the appropriate remedy. The chief judge of the First Circuit, in a dissent, said:

> "I recognize the undesirable consequences of holding *Breed* retroactive, but I think Mr. Justice Rehnquist's opinion for a unanimous court in *Robinson v. Neil* * * * virtually compels the conclusion that *Breed* is retroactive. * * * The court refused to apply the three pronged *Linkletter desist* criteria reasoning that they had no applicability to rules that in practice prevent a trial from taking place at all, rather than merely prescribing procedural rules." *Jackson v. Justices of the Superior Court of Massachusetts,* 549 Fed.2d 215, at p. 221.

In *Holt v. Black,* 550 Fed.2d 1061 (CA 6, 1977), the Sixth Circuit squarely held that the double jeopardy holding of *Breed v. Jones* must be given retrospective application.

Thus it is clear that *Burks v. United States* and *Greene v. Massey* are to be given retrospective application. Retroactivity is not a question in the instant case, since Defendant's motion for new trial was pending at the time the Supreme Court decided *Burks v. United States* and *Greene v. Massey,* but even if the retroactivity of those cases is deemed significant, it is clear from *Robinson v.*

Neil that double jeopardy decision must be given retroactive application.

Respectfully submitted,

FOREMAN & DEGUERIN

By: _____

DICK DEGUERIN
Attorneys for Defendant
806 Main, Suite 512
Houston, Texas 77002
224-9321

CERTIFICATE OF SERVICE

I, Dick DeGuerin, hereby certify that a true and correct copy of the foregoing "Memoranda in Support of Defendant's Motion for New Trial and Motion in Arrest of Judgment" has been furnished to the office of the District Attorney of Harris County, Texas this 3rd day of July, 1978.

_____

DICK DEGUERIN

APPENDIX B

NO. 78,1084

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS
AUSTIN, TEXAS

ANN BATTARBEE

vs.

THE STATE OF TEXAS

APPELLANT'S BRIEF ON APPEAL

Appeal From Cause No. 271,632 in the
183rd Judicial District Court of
Harris County, Texas

FOREMAN & DEGUERIN
Dick DeGuerin
Attorneys for Appellant
806 Main, Suite 512
Houston, Texas 77002
(713) 224-9321

TABLE OF CONTENTS
(Omitted)

TABLE OF CITATIONS
(Omitted)

GROUNDS OF ERROR

GROUND OF ERROR NUMBER ONE

DEFENDANT'S SECOND TRIAL FOR KILLING HER HUSBAND OFFENDS THE DOUBLE JEOPARDY CLAUSE OF THE UNITED STATES AND TEXAS CONSTITUTIONS.

GROUND OF ERROR NUMBER TWO

THE INDICTMENT IS DEFECTIVE AND DEFENDANT'S MOTION TO QUASH THE INDICTMENT SHOULD HAVE BEEN GRANTED.

STATEMENT OF THE NATURE OF THE CASE

In 1973 Defendant was charged by indictment with the offense of murder with malice aforethought in connection with the death of her husband, Vernon Battarbee. This indictment bears Cause No. 194,899 and is found as an exhibit to the hearing on Defendant's Plea in Bar, beginning on page 177 of the Record on Appeal. Defendant was convicted of this offense but on appeal her conviction was reversed because of insufficient evidence. *Battarbee v. State,* No. 50980, 537 S.W.2d 12 (Tex. Crim. App. 1976), the Court, per Judge Douglas, saying:

> "* * * the evidence considered in the light most favorable to the finding of guilt by the trial court is insufficient as a matter of law." Battarbee v. State, 537 S.W.2d at p. 16.

Pursuant to the then existing Texas law, the case was remanded to the trial court. There after several sunperceding indictments were returned, the last of which resulted in the instant conviction for killing Vernon Battarbee "with malice aforethought" by "failing, refusing and omitting to provide support, care, medical attention, proper medical treatment and hospitalization". Defendant's Plea in Bar on Double Jeopardy grounds (R. 15) was denied, as was Defendant's Motion to Quash Indictment (R. 9). After her conviction, on June 15, 1978, Defendant obtained leave of court to file her Amended Motion for New Trial (R. 3286) and Motion in Arrest of Judgment (R. 3284), based on Double Jeopardy grounds as announced the previous day by the United States Supreme Court in *Burks v. U. S.*, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (June 14, 1978) and *Greene v. Massey,* 437 U.S. 19, 98 S.Ct. 2151, 57 L.Ed.2d 15 (June 14, 1978). The trial court overruled both motions and Defendant gave notice of appeal. All appellate prerequisites have been met.

STATEMENT OF FACTS

Although the trial was lengthy and complex, the Record encompassing eight fat volumes, the Grounds of Error are simple and concise and there is no need to relate the facts here. All that matters is that Defendant's earlier conviction for killing her husband was reversed for insufficient evidence and that, over her timely and persistent invocation of her Double Jeopardy rights, she was again tried and convicted for killing her husband.

ARGUMENT AND AUTHORITIES

GROUND OF ERROR NO. ONE RESTATED

DEFENDANT'S SECOND TRIAL FOR KILLING HER HUSBAND OFFENDS THE DOUBLE JEOPARDY CLAUSE OF THE UNITED STATES AND TEXAS CONSTITUTIONS.

ARGUMENT UNDER GROUND OF ERROR NUMBER ONE

The United States Supreme Court has now held that a second trial is prohibited once a reviewing court has determined that there was insufficient evidence to support the verdict. *Burks v. U. S.*, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978); *Greene v. Massey,* 437 U.S. 19, 98 S.Ct. 2151, 57 L.Ed.2d 15 (1979). In *Battarbee v. State,* No. 50980, 537 S.W.2d 12 (Tex. Crim. App. 1976), this court held that Defendant's conviction for killing her husband must be reversed for insufficient evidence to support the verdict:

> "* * * the evidence considered in the light most favorable to the finding of guilt by the trial court is insufficient as a matter of law". *Battarbee v. State,* 537 S.W.2d at p. 16.

Defendant was then put to trial again on an accusation that she killed her husband. She persistently objected to the second trial on the basis of her protection against "double jeopardy" as guaranteed by the Fifth Amendment to the United States Constitution and Article I, Section 14 of the Texas Constitution, but she was again convicted.

The Court of Criminal Appeals has held that the Double Peopardy rule of *Burks v. U. S.* and *Greene v. Massey,* supra, are to be given retroactive application. *Ex Parte Mixon,* 583 S.W.2d 378 (Tex. Crim. App. 1979); *Ex Parte Reynolds,* 588 S.W.2d 900 (No. 60647, Tex. Crim. App. 1979); *Ex Parte Dixon,* 583 S.W.2d 793 (Tex. Crim. App. 1979). Even so, *Burks v. U. S.* and *Greene v. Massey* were decided on June 14, 1978, *before* the trial

court here had ruled on Defendant's Motion for New Trial and Motion in Arrest of Judgment. Defendant should not have been tried again and her conviction should be set aside and a judgment of acquittal entered.

GROUND OF ERROR NUMBER TWO RESTATED

THE INDICTMENT IS DEFECTIVE AND DEFENDANT'S MOTION TO QUASH THE INDICTMENT SHOULD HAVE BEEN GRANTED.

ARGUMENT UNDER GROUND OF ERROR NUMBER TWO

The indictment alleged:

> "Ann Battarbee * * * as the wife of Vernon Battarbee * * * did have a statutory duty to support [Vernon Battarbee], *by providing medical attention* to [Vernon Battarbee] * * * [and she] did kill [Vernon Battarbee] by * * * failing, refusing and omitting to provide support, care, medical attention, proper medical treatment and hospitalization for [him] * * *."

Defendant moved to quash the indictment on the basis that the indictment alleged a duty not owed under Texas law, that of "providing medical attention" and that the omission charged, i.e. failure to provide care, proper medical treatment and hospitalization, was not within the duty owed. The trial court denied the Motion to Quash.

The only duty owed by one spouse to the other, in Texas, is the duty of support outlined in Section 4.02 of the Texas Family Code:

> "Each spouse has the duty to support his or her minor children. The husband has the duty to support

> the wife, and the wife has the duty to support the husband when he is unable to support himself * * *".

The duty of support owed by a parent to a child is further defined in Section 12.04, Texas Family Code, as

> "the duty to support the child, including providing the child with clothing, food, shelter, medical care and education * * *".

However, there is no further definition in the Family Code of the duty of support one spouse owes another. The indictment pled a duty not owed and Defendant's Motion to Quash the indictment should have been granted.

CONCLUSION AND PRAYER

For the reason stated, the conviction should be reversed and a judgment of acquittal should be entered.

Respectfully submitted,

FOREMAN & DEGUERIN

By: _____

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CERTIFICATE OF SERVICE

I, Dick DeGuerin, hereby certify that a true and correct copy of the foregoing "Appellant's Brief" has been furnished to the office of the District Attorney of Harris County, Texas, 301 San Jacinto, Houston, Texas, this 27th day of September, 1979.

_____

Dick DeGuerin

APPENDIX C

NO. 271,632

IN THE 183RD DISTRICT COURT
OF HARRIS COUNTY, TEXAS

---

and

NO._____

IN THE COURT OF CRIMINAL APPEALS
OF TEXAS, IN AUSTIN

ANN BATTARBEE
Appellant

v.

THE STATE OF TEXAS
Appellee

STATE'S APPELLATE BRIEF

JOHN B. HOLMES, JR.
District Attorney
Harris County, Texas

JAMES C. BROUGH
Assistant District Attorney
Harris County, Texas

JACK BODIFORD
Assistant District Attorney
Harris County, Texas

RUSSELL HARDIN
Assistant District Attorney
Harris County, Texas

Counsel for Appellee

TO THE RESPECTIVE COURTS:

OFFENSE: Murder

PENALTY: 10 Years, Probated

Immediately following the docket sheet in Appellant's Exhibit 1 in her plea in bar, which begins at R. 177, is a copy of the indictment in Cause No. 194,899, State of Texas v. Ann Battarbee.

On this indictment Appellant was convicted of murder. On appeal that conviction was reversed for insufficient evidence and remanded, *Battarbee v. State,* 537 S.W.2d 12.

Subsequently Appellant was re-indicted in this cause (R. 5), this indictment alleging, in the first paragraph, murder by act, and, in the second paragraph, murder by omission.

The jury was charged only on murder by omission (R. 39 *et seq.*). The verdict of guilty was returned by this jury (R. 52, R. 60) and, on Appellant's timely election, the court assessed punishment at ten years confinement, but suspended imposition of sentence and placed Appellant on probation (R. 60-61). Appellant gave notice of appeal, and is free on original bond pending appeal (R. 61).

In her brief filed with the clerk of the trial court, Appellant claims prior jeopardy.

This claim was made at trial, in Appellant's plea in bar (R. 15-25), heard October 7, 1977 (R. 111).

At that time, the law of Texas required that a case reversed for insufficient evidence be remanded for new

trial, and this had been done (R. 25). Article 44.24(b) C.C.P. limited the power of the Court of Criminal Appeals of Texas to the power to affirm, reverse and remand for new trial, reverse and dismiss, or reform and correct the judgment.

Article 44.25 C.C.P. specifically ordered that a cause reversed because the verdict is contrary to the evidence shall be remanded for new trial.

This Court properly denied Appellant's plea in bar on October 21, 1977 (R. 126-27).

On June 14, 1978, the United States Supreme Court handed down its opinion in *Burks v. United States,* 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1, and *Greene v. Massey,* 437 U.S. 19, 98 S.Ct. 2151, 57 L.Ed.2d 15.

The *Burks* case changed the federal law on jeopardy. Previously, if a federal case was reversed for insufficiency of evidence, the appellate court had the power and duty, under 28 U.S.C.A., 2106, to order acquittal, unless—as is true in the case at bar—the appellant had filed his motion for new trial, in which case he received the new trial he had sought. *Greene, supra,* applied *Burks* to a Florida state court case.

On June 15, 1978, Appellant obtained leave of court to file her Amended Motion for New Trial (R. 3286), and Motion in Arrest of Judgment (R. 3284), claiming prior jeopardy under the *Burks* and *Greene* cases. These motions were argued before the court July 5, 1978, first the defense (R. 3183) and then the State (R. 3196), and then the defense again (R. 3204).

The main point of contention was whether or not the new rule of *Burks v. United States, supra,* and *Greene*

v. Massey, supra, which expanded jurisdiction of the Texas Court of Criminal Appeals, should apply retroactively to Texas cases.

The argument made by the Appellant was substantially that later set forth in Judge Odom's majority opinion, en banc, in *Ex Parte Edith Reynolds,* Cause No. 60,647, opinion of June 20, 1979. The State, in substance, argued, and presented in its memorandum opposing these motions (R. 74), the view and authorities later set forth in the dissenting opinion in *Ex Parte Reynolds, supra* by Judge Douglas, with Judge W. C. Davis concurring.

The court in the instant case recessed the hearing until July 7, 1978 (R. 3208), and then until August 3, 1978 (R. 103), when it reconvened (R. 103, R. 3210), heard further similar argument from the defense, and then denied the defense motions which rested on the claim of former jeopardy (R. 3218).

The court stated (R. 3218):

> I feel, in the opinion of the court, there is certainly an issue of law that is to be determined.

At that time, no decision had been made by the Texas Court of Criminal Appeals on the retroactivity of *Burks v. United States, supra,* and *Greene v. Massey, supra.* Subsequently, on February 28, 1979, in *Ex Parte Mixon,* 583 S.W.2d 378, *Burks* and *Greene* were held, rather briefly, to be retroactive. A State's Motion for Leave to File Motion for Rehearing was filed in *Mixon.*

On June 20, 1979, *Ex Parte Reynolds* was decided with a rather extended opinion by Judge Odom, holding *Burks* and *Greene* to be retroactive, and with Judge Douglas' strong dissenting opinion.

On July 18, 1979, the State's Motion for Leave to File its Motion for Rehearing in the *Mixon* case was denied. Judge Douglas dissented for the reasons stated in his *Reynolds* dissent.

On September 19, 1979, the State's Motion for Leave to File Motion for Rehearing in the *Reynolds* case was denied, making that decision final.

On July 18, 1979, the same day the final ruling was made in *Ex Parte Mixon, supra,* an en banc decision was handed down in *Ex Parte Dixon*, 583 S.W.2d 793. Judge Douglas, who the same day recorded his dissent as to *Mixon,* wrote the opinion.

Noting that the Court of Criminal Appeals had held *Burks* and *Greene* to be retroactive, he applied this holding, granting relief to *Dixon.*

The United States Supreme Court has not yet decided whether *Burks v. United States, supra,* and *Greene v. Massey, supra,* are retroactive or merely prospective. The writer of this brief believes that the position taken by Judge Douglas in his dissenting opinion in *Ex Parte Reynolds, supra,* is sound, and may be the position eventually taken by the United States Supreme Court, but, at present, knows of no authority to urge in support of this position which has not been obviously considered by the Texas Court of Criminal Appeals.

This highest Texas court in criminal case jurisdiction has now clearly and repeatedly held *Burks* and *Greene* to be retroactive.

By a five to four decision in *Roger Dale Porier,* opinion of October 3, 1979, the majority opinion by Judge Douglas held *Burks* and *Greene* do not apply when enhance-

ment allegations are not adequately proved. The dissenting opinion by Judge Odom stated, inter alia:

> Retrial of the issue . . . denies appellant due course of law under Art. I, § 19 of the Texas Constitution.

Such a newly found holding in a majority opinion, would preclude a review on certiorari by the United States Supreme Court.

CONCLUSION

In summary, at this time the law on the issue of Appellant's claim of former jeopardy, as decided in Texas, clearly supports Appellant's position.

Nevertheless, because the writer of this brief believes the dissenting opinion in *Ex Parte Reynolds, supra,* is the sounder position and should eventually prevail, the State contends that the conviction in the case at bar should be affirmed.

Respectfully submitted,

/s/ JAMES C. BROUGH
James C. Brough
Assistant District Attorney
Harris County, Texas

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing instrument has been mailed to the following address:

/s/ JAMES C. BROUGH
James C. Brough
Assistant District Attorney
Harris County, Texas
201 Fannin
Houston, Texas 77002

Date: Oct. 18, 1979
gsb